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IN THE

Supreme Court of the United States

OCTOBER TERM — 1969

No. 589

RAYMOND CHARLES CURIALE,
Petitioner,

—against—

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit rendered on August 4, 1969, which affirmed a judgment of the United States District Court for the Eastern District of New York, entered on October 25, 1968 (Mishler, *D.J.*).

Opinion Below

On August 4, 1969, the United States Court of Appeals for the Second Circuit unanimously affirmed the judgment of the District Court. The opinion per Judge Anderson is not officially reported. It is annexed, however, to the instant petition as Exhibit A.

Jurisdiction

The order of affirmance of the United States Court of Appeals for the Second Circuit was made on August 4, 1969. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 876; 28 U.S.C., Section 877.

Questions Presented

1. Whether, petitioner's consent to search his place of business, where a search predicated upon such consent ultimately disclosed newly minted stolen United States dimes the property of the United States Government, was involuntary?

2. Whether, an admitted omission by the F.B.I. to give the *Miranda* warnings to petitioner at the time he was taken into custody at his abode constitutionally vitiated the ensuing proceedings at a Police Stationhouse where the F.B.I. brought petitioner, under restraint, and where the consent to search petitioner's place of business was obtained in light of *Orozco* v. *Texas,* 394 U.S. 324 (1969)?

3. Whether, the Court's instruction in this case illustrating the Common Law Rule governing the presumed inference to be drawn from the "Recent and Exclusive Possession of Stolen Property" was constitutionally impermissible in light of *Miranda* v. *Arizona,* 384 U.S. 436, 477 (1966)?

Statement

The judgment in this case was rendered on the 25th day of October, 1968, before the Honorable Jacob Mishler, United States District Judge for the Eastern District of New York, sentencing the petitioner upon his conviction of the crimes of violating Section 641, Section 659 and Section 2315 of the United States Code, Title 18.

The petitioner was sentenced to Five Years imprisonment on each count. The sentences are to be served concurrently pursuant to Title 18, U.S.C., Section 4208(a)(2). A notice of appeal, dated March 28, 1968, was duly filed and served. The petitioner is presetnly free on bail set at $100,000. A cash bail of $10,000 was posted and guaranteed by members of his immediate family pursuant to the Bail Reform Act.

The Facts

The petitioner was tried to a jury on the first four counts of the indictment; the remaining counts were severed upon the Government's motion. The third count of the indictment was dismissed at the conclusion of the Government's case. Petitioner was convicted upon the remaining three counts. In essence, the petitioner was convicted of possessing and concealing approximately three million United States Government dimes having an approximate value of $300,000 and being the property of the United States Government. These dimes were part of a $500,000 cargo of coins which constituted an interstate shipment of freight from the United Silver Depository, West Point, New York, to the Federal Reserve Bank in Oklahoma City, Oklahoma.

Among the preliminary witnesses was Charles DePew, a driver of the vehicle and employed by the Railway Express Company owning and operating said vehicle. On May 28, 1968, the truck was robbed of its cargo of coins and the said Charles DePew allegedly kidnapped (R. 200-233).

Inasmuch as the petitioner's conviction is predicated upon the seizure of evidence resulting from a search of his place of business located at 160 West Avenue, Patchogue, Long Island, New York, whereat some $304,000 in stolen, newly minted United States Government dimes were seized by Agents of the F.B.I., which were part of the original

$500,000 shipment of coins above referred to, it is unnecessary to engage in an extensive summary of the trial at this point for in assailing the constitutional propriety of the search of petitioner's premises it was necessary to do so under our Argument I, *infra*.

ARGUMENT

POINT I

The search and seizure of the newly minted dimes located at petitioner's business premises was based upon petitioner's involuntary consent. Petitioner's conviction is based entirely upon this illegal seizure of evidence.

The sum and substance of Agent-in-Charge Ahearn's and Agent Curry's testimony at the pre-trial Motion to Suppress hearing (F.R.C.P., R. 41-E) is to the effect that they had a strong "suspicion" that the stolen coins were being stored at petitioner's place of business.

It was established beyond any doubt through the very testimony of Agent Ahearn that the Government did not have sufficient evidence to obtain a duly certified search warrant to search Curiale's place of business on June 6, 1968, the date of the search of said premises.

Indeed, Agent Ahearn admitted that he had telephoned Chief Assistant United States Attorney William Kelly, Criminal Division, Eastern District of New York, earlier on June 6, 1968, in order to determine whether or not he had sufficient information with which to procure a Court executed search warrant. He was unequivocally informed that *he did not* (97a, 106a-108a).*

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* Numerals followed by the letter "a" denote page numbers in Appellant's Appendix.

On June 6, 1969, from approximately 3:00 o'clock in the afternoon Curiale had been under such "close" surveillance that it became evident to him that he was being followed. Indeed, Curiale, while at a local Little League ballpark approached the F.B.I. car in which Agent Curry was a passenger—along with three other agents—and inquired "if he could finish a baseball game then in progress". Petitioner Curiale was a manager of a "Little League" baseball team (8a). He also inquired of these agents why he was being followed (20a).

After the completion of the ballgame Curiale left with his son, a member of the baseball team Curiale managed, and two other boys. Again he was closely followed by Agent Curry and the three accompanying agents (139a-140a).

Curiale arrived at his home and drove into the driveway while Agent Curry and the accompanying agents drove directly in back of him. At this point, Agent Curry displayed his credentials and asked Curiale to accompany him and the other agents to the Fifth Precinct at Patchogue, New York (8a-9a).

The arrest and detention of Curiale occurred *after* it was clearly and positively ascertained that there was insufficient evidence with which to procure an arrest or search warrant (106a).

There can be *no* dispute that Curiale was *arrested* without probable cause and brought to the Fifth Precinct.

(By Mr. Grunewald, the trial prosecutor):

> "Q. Did he indicate to you whether or not he was willing to go? A. He stated that he would go with us.
>
> Q. Was he under arrest? A. *He was*—" (9a).

After the "cat" was out of the bag, so to speak, the agents were to inconsistently characterize Curiale's *arrest* and detention without probable cause as an "invitation" * to accompany him to the Fifth Police Precinct. Unquestionably, the purpose for this unlawful detention was to place Curiale in the "coercive" atmosphere of police detention at the Fifth Precinct. This fact is graphically demonstrated by Agent Curry's very own testimony that at the time of petitioner's arrest he had told Mrs. Curiale, who was present, that "he (Curiale) had agreed to accompany us to Patchogue to discuss a matter we had under investigation, and we had reason to believe that he could be of as-

---

* It would be seemingly unrealistic to conclude that the Agents' intent was other than to intimidate Curiale into believing that "the jig was up", so to speak. Thus, placing Curiale in the "proper frame of mind" to sign the waiver (Government's Exhibit 2 in evidence) permitting the search we assail as not the voluntary act of the petitioner. Judge Anderson, in his opinion below, finds that there was no necessity for the *Miranda* warnings at this juncture since Curiale was merely invited by the agents to accompany them to the Stationhouse. We must respectfully submit that this finding is inconsistent with reality. In less than ten minutes the agents had Curiale in the coercive atmosphere of the Stationhouse. They immediately gave him the *Miranda* warnings of a suspect. Nothing new had transpired in the ten minutes it took to drive to the Stationhouse. We submit that the F.B.I. Agents deliberately withheld the warnings at Curiale's abode in order to obtain an advantage. Cf. *Orozco* v. *Texas* (394 U.S. 324) (1969). Moreover, the testimony of the F.B.I. Agents is clear. Curiale was indeed a suspect in this criminal venture. Accordingly, under the teachings of *Orozco* v. *Texas, supra*, the *Miranda* warnings were indispensable when he was taken into custody at his residence. Judge Anderson also found lack of merit to petitioner's claim "because no incriminating statements were elicited from him during the period prior to the warnings". With all due deference to the erudite Court below, it seems to have missed the thrust of petitioner's argument. We submit that a suspect is more apt to stand "bold" having been advised of his rights in the familiar surroundings of his abode, among family and friends, than in the "unfamiliar", forbidding atmosphere of a Stationhouse. He was entitled to have these warnings under the former circumstances, not under circumstances created by the F.B.I. Agents to induce a forfeiture of cherished rights. At any rate, the ultimate signing of the "Consent to Search Form", which we submit was improperly obtained, was equally damaging to Curiale as any incriminating statement and as such there can be no moral or legal distinction made.

sistance to us in furnishing information". Contrary, of course, to the Agents' prior testimony that Curiale was under arrest (9a, 10a, 121a).*

It is an undisputed fact therefore that at the time of his being taken into custody Curiale had not been advised of his right to counsel nor of any of his other Constitutional rights (37a).

In the event the Agents' afterthought characterization of "invitation" is to be somehow validly credited and Curiale had merely accepted this gracious "invitation" to accompany the agents to the Stationhouse so that they could become better acquainted, the detention is nevertheless constitutionally unlawful inasmuch as Curiale was neither informed of his Constitutional rights nor that he had *no* legal obligation to accompany the agents to the Police Precinct (37a).

(By Mr. Rosenberg, petitioner's attorney):

> "Q. So, that as far as you recall, there was no advice given to the defendant with respect to his conconstitutional rights or to his wife prior to the time he entered the precinct, is that correct? *It wasn't necessary at this time.*
>
> Q. Please, I didn't ask you that. I merely asked you whether or not that was done, or if it wasn't done, as far as you recall? A. I invited him down. He agreed to come. Any further conversation—.

---

* It cannot be emphasized too strongly that Government's Exhibit 2 in Evidence, the Consent to Search Form, signed by Curiale was only obtained after unrelenting, intimidating F.B.I. surveillance and coercive unlawful custodial detention; and after having been earlier informed by an Assistant United States Attorney that they (the F.B.I. Agents) could not obtain a lawful search warrant. Furthermore, that at the time Curiale was taken into custody he was an acknowledged "suspect" but the *Miranda* warnings which should, but were not forthcoming, as reflected by *Orozco* v. *Texas, supra,* played a key role in constitutionally infecting voluntariness of the consent to search.

Mr. Rosenberg: Your Honor, I ask that be stricken.

The Court: Strike it from the record. *You never advised him as to his constitutional rights?*

The Witness: *That is correct"* (38a-39a).

Upon his arrival at the Fifth Precinct, Curiale was turned over to Agent-in-Charge Ahearn. According to Agent Ahearn, he (Ahearn) informed Curiale that he was interested in a search of his place of business, the "West Avenue Sportswear Corporation" in Patchogue, New York (71a).

Agent Ahearn thereupon informed Curiale that he had received information that stolen property was being stored on his premises (72a).* The same information that was held insufficient to procure either an arrest or search warrant (20a).

Agent Ahearn then handed Curiale a "Consent" form (Government's Exhibit 2 in Evidence). At this point in the record it becomes quite evident that the psychological impact of the harassing, intimidating surveillance—the unlawful arrest of the petitioner at the very threshhold of his abode and in plain view of his family and neighbors succeeded in creating the unfair illusion in Curiale's mind so desired by the F.B.I. Agents because he responded: "If I don't sign this you are going to get a search warrant" (73a).

Agent Ahearn asserts that he cautioned Curiale—that he did not wish him to sign the consent form "on that basis" (73a).

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* This information was therefore in the agents' possession when Curiale had been taken into custody at his residence. We reiterate, under *Orozco* v. *Texas, supra,* the *Miranada* warnings were mandated at that juncture.

However, Curiale again voiced the view that if he did not sign the "Consent" form under the prevailing circumstances, as they then appeared to him to be, Agent Ahearn could and would procure a search warrant.

Agent Ahearn, contrary to the former occasion when Curiale said he would sign the "Consent" waiver because "If I don't sign this you are going to get a search warrant", did not caution him as he did before but merely remained silent and permitted Curiale to perpetuate, in his erroneous conception of the situation. The signing of the "Consent to Search Form" thereupon followed (74a). Cf. *Bumper* v. *North Carolina,* 391 U.S. 543, 550 (1968).

Agent Ahearn, in the company of the other agents and with Curiale in custody, left the Fifth Precinct to conduct a search of petitioner's business premises.

The search did ultimately result in the seizure of some $304,000 in newly minted dimes that were part of the $500,000 theft of United States Government dimes (83a).*

As aforementioned, it was adduced that not until Curiale was in custody at the Fifth Precinct was he finally advised of his Constitutional rights (84a).

Moreover, interviewing Curiale at his home was discussed but rejected by Agent-in-Charge Ahearn. In Ahearn's very own words: "It at all possible it was to interview him at the police precinct." Counsel queried: "With the alternate hope of getting the waiver?" To which Agent Ahearn admitted: "That is correct" (109a).

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* Curiale testified at trial that Agent Ahearn stated to him that if he did not consent to the search, he (Ahearn) could and would obtain a search warrant. Nevertheless, we proceed upon this appeal based on the Government's reasoning of the facts which we submit, *infra,* still requires a finding of involuntary consent.

Agent Ahearn made no endeavor to ascertain whether or not Curiale understood the contents of the "Consent to Search Form" (111a):

(Cross-examination of Agent Ahearn):

> "Q. When he stated (Curiale) that you were going to get a search warrant anyway, and other than your admonition to him, did you tell him anything else with respect to the search warrant? A. Not that I recall" (115a).

Dr. Herbert Wender is a psychiatrist and psychologist, associated with Brookdale Hospital. He examined petitioner Curiale and testified for the defense. He found Curiale to be extremely shy and reserved with a rather definite feeling of inferiority. Furthermore, a person of poor or limited educational background—a person who is uncertain of himself, *particularly in a group* (139a).

A hypothetical question was then propounded to Dr. Wender predicated upon the events which we outlined above concerning the "close" surveillance, custodial detention which culminated in the signing of the "Consent to Search Form" as it related to the issue of "voluntariness" (140a-141a).

The psychiatrist's opinion, in essence, is that anyone placed in the position which Curiale found himself would be under extreme emotional stress (142a).

The psychiatrist continued with his opinion with respect to Curiale's signing of the "Consent" for as follows:

> "However, in addition, the defendant did say to me in the interview, that when he got to the station-house, the precinct house, his heart was palpitating, beating very fast. He didn't know what he could do about it.

> This to me, as a psychiatrist, represents a very definite sign of anxiety and severe anxiety. Based upon that idea that there was extreme anxiety evidenced by this particular person in this situation, and given the kind of personality that I have stated in regard to him, I would then say that this patient was under considerable strain and considerable difficulty. And that there would be a doubt in my mind as to whether he knew really what he was signing" (145a).
>
> * * * * *
>
> "I believe that there was a desire on the part of this client, this defendant, to remove himself from the situation as quickly as possible, and that this is the motivation which makes him sign the paper as quickly as possible, *even, without knowing what it was*" (145a).

The aggressive conduct of the F.B.I. Agents by "closely" following the petitioner even after it had been determined that probable cause did not exist for either his arrest nor for the search of his place of business and his illegal arrest at the very door of his home, in plain view of both his family and neighbors constituted an implied threat placing petitioner in obvious fear. *Catalonotte* v. *United States*, 208 F.2d 264 (6th Cir. 1953); *United States* v. *Alberti*, 120 F. Supp. 171 (S.D.N.Y.) (1954); *Bumper* v. *North Carolina, supra.*

On the basis of the Government's very own testimony there can be no doubt that Curiale was illegally arrested at the threshhold of his home. It therefore follows that the ensuing detention was also unlawful.

In a word, the "Consent to Search Form" was signed during a period of unconstitutional detention following an unlawful arrest and as such the "Consent" form constitutes a nugatory instrument of authority.

POINT II

Failure to give the Miranda warnings at the time of Curiale's arrest vitiated the ensuing custodial proceedings which culminated in the signing of the consent to search form—Orozco v. Texas, 394 U.S. 324 (1969).

This Court very recently held in *Orozco* v. *Texas,* 394 U.S. 324 (1969) that the *Miranda* warnings (*Miranda* v. *Arizona,* 384 U.S. 436 (1966) were not limited to "in custody" interrogation but instead extends to the very instant of arrest. Although the F.B.I. was to later characterize petitioner's arrest as an "invitation" to accompany them to the Stationhouse, it seems to be a safe assumption, in light of the legion of cases defining arrest that Curiale, to all intents and purposes, was under arrest when he left his home in the custody of the F.B.I. Agents destined for the Fifth Precinct Stationhouse.

The *Miranda* warnings were therefore essential if the ensuing events were to be free from Constitutional taint. The conceded omission to give the *Miranda* warnings (9a) fatally contaminated the ensuing events culminating in the signing of the "Consent to Search Form".

Had the warnings been given *in the familiar and friendly atmosphere of petitioner's residence* and had petitioner requested counsel at that juncture, as he *ultimately* did, but only after the seizure of the coins, there could have been no constitutionally valid signing of the "Consent to Search Form" and therefore no valid seizure of the evidence utilized to convict him.

The conceded omission of the Agents to advise Curiale of his rights at this juncture is seemingly the result of a misconception on the part of Agent Curry of the range and reach of the *Miranda* ruling—for when cross-examined by petitioner's trial counsel concerning the *Miranda* warnings

prior to the taking of Curiale into custody, Agent Curry answered: "It wasn't necessary to tell him" (37a).*

Inasmuch as the omission to give the *Miranda* warnings manifestly affected the ultimate search and the seizure of the sole evidence in this case such omission cannot be deemed innocuous. *Chapman* v. *California,* 386 U.S. 18 (1968).

Although we submit that there is an ample basis for a finding that the arrest in this case occurred when Curiale was taken into custody at his abode, this Court may not share petitioner's view of the facts. If this be the case it may be advisable to remand the case to the District Court for a further factual determination as to precisely when the arrest of Curiale took place. *Sibron* v. *New York,* 392 U.S. 40, 67 (1968); *People* v. *Butterly,* 25 N.Y. 2d —, New York Court of Appeals, decided July 2, 1969; *Martinez* v. *United States,* 380 U.S. 260 (1965), vacating 333 F.2d 405 (9th Cir. 1964).

POINT III

The Court's charge with respect to the common law rule governing the recent exclusive possession of stolen property is violative of the broad intendment of Miranda v. Arizona, 384 U.S. 436.

The learned trial Court below charged the jury on the law governing the recent possession of stolen property as follows:

> "* * * if you find that the coins were recently stolen, then if such possession *is not satisfactorily explained,* it is a circumstance from which the jury may rea-

* Counsel questioned Agent Curry in this regard inasmuch as he was aware that the *Orozco* case was then before this Court, *sub judice.*

sonably draw the inference and find in the light of surrounding circumstances shown by the evidence in the case, that the person in possession *knew* the property had been stolen" (196a).

Counsel for the petitioner, even before the Court's charge, objected to such an instruction that the recent possession of stolen property "gives rise to the inference that the defendant *knew* it was stolen". The Court responded: "That is right. You can take exception to it but I am certainly going to charge that" (172a-173a).

After the verdict had been rendered the petitioner, through his attorney, moved by notice of motion and supporting affidavit to set the verdict aside upon the ground that such an instruction, defining the recent exclusive possession of stolen property—although it had accurately incorporated a common law rule almost uniformly adhered to—was in conflict with the rule of *Miranda* v. *Arizona, supra.*

The motion was denied with an exception to the defendant on October 25, 1968, the date of petitioner's sentencing.

In *Young* v. *State,* 203 S. 2d 650 (District Court of Appeals of Florida) the Appellate Court there agreed that an instruction similar to the one assailed here was constitutionally impermissible. The Court noted first that the Court's charge accurately defined the Common Law rule governing the recent exclusive possession of stolen property.

However, in reversing *Young's* conviction for breaking and entering with intent to commit a felony, the Court believed that *Miranda* v. *Arizona, supra,* had overruled that Common Law principle.

The Court in the *Young* case reasoned that since this Court in *Miranda* had held in footnote 37 to its opinion

that the accused's failure or refusal to speak could never be used against him at trial then an accused's failure to explain possession of stolen goods could not be the basis of a conviction.

The sole distinction between the instruction in the *Young* case and the challenged instruction in the case at bar is that in the *Young* case the Court had added to its charge that such unexplained possession, in itself, is sufficient to support a conviction.

The distinction is *truly* insignificant. The instruction in this case, i.e., an inference flowing from the recent possession of stolen property to the effect that the possessor *knew* that the property was stolen, amounts to an instruction as in the *Young* case that such possession is sufficient to support a conviction since *knowing* possession of stolen Government property is all the Government had to prove here to support a conviction upon the three counts of the indictment submitted to the jury (see, Court's Charge, 189a, *et seq.*).

The instant case is more "on all fours" than analogous with the *Young* case, which we submit properly reflects the broad intendment of the *Miranda* rule. Certainly, if this Court concludes that the Common Law rule of unexplained possession of stolen property has been overruled by *Miranda* then the error of such an instruction which manifestly facilitates conviction cannot dissipate as harmless. Particularly so in this case where the petitioner had urged the Court to omit such an instruction from its charge to the jury. *Miranda* was the law long before the petitioner went to trial. Therefore, it follows that there is no question in this case of retroactivity for, if this Court concludes that the challenged instruction was error, its decision would merely constitute a correct interpretation of the *Miranda* rule which had been rendered aforesaid—long before petitioner's trial and conviction.

CONCLUSION

It is respectfully prayed that the petition for a writ of certiorari be granted.

Respectfully submitted,

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APPENDIX

Exhibit A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

———o———

No. 653—September Term, 1968.

(Submitted June 12, 1969 Decided August 4, 1969.)

Docket No. 33422

———o———

UNITED STATES OF AMERICA,

Appellee,

—v.—

RAYMOND CHARLES CURIALE,

Appellant.

———o———

Before:

MOORE, SMITH and ANDERSON,

Circuit Judges.

———o———

Appeal from judgments of conviction for knowingly possessing stolen property of the United States, moving in interstate commerce, in violation of 18 U.S.C. §§ 641, 659, 2315 and 2, in the United States District Court, Eastern District of New York, before Jacob Mishler, *Judge,* and a jury. Affirmed.

———o———

VINCENT T. MCCARTHY, U. S. Attorney, Eastern District of New York; Raymond Bernhard Grunewald, Assistant U. S. Attorney, Eastern District of New York, on the brief, *for Appellee.*

THEODORE ROSENBERG, ESQ., and Richard I. Rosenkranz, Esq., Brooklyn, New York, on the brief, *for Appellant.*

—o—

ANDERSON, *Circuit Judge*:

Raymond Curiale appeals from judgments of conviction on three counts of an indictment, entered on jury verdicts of guilty, on October 25, 1968, for receiving or having in his possession, with intent to convert to his own use and gain, and with knowledge that they were stolen, 3,000,000 United States dimes which were the property of the United States and which had been stolen while moving as and constituting an interstate shipment of freight, in violation of 18 U.S.C. §§ 641, 659, 2315 and 2. The appellant was sentenced to five years imprisonment on each count, the sentences to run concurrently. We affirm.

There was evidence from which the jury could have found the following facts. On May 29, 1968, a tractor-trailer carrying 5,000,000 United States dimes from the United States Silver Depository at West Point, New York to Newark, New Jersey was hijacked at Fort Lee, New Jersey. The driver was forced to drive the truck to Queens County, New York, where he was transferred to a car and returned to New Jersey. The truck was then driven off by the hijackers in an easterly direction toward Long Island and was later found abandoned, its gears burned out, in an empty lot in Blue Point on Long Island on the morning of May 30, 1968.

On June 6, 1968, pursuing a tip that the stolen dimes were being stored at a factory at 160 West Avenue, Patchogue, New York, which was approximately two miles from where the abandoned truck was discovered, agents of

the Federal Bureau of Investigation conducted a vehicular surveillance of Curiale, the owner of the factory. Apparently aware that he was under continuous observation, the appellant, Curiale, approached the agents' car and asked why they were following him. Special Agent Curry replied by asking, "What makes you think so?" Observing the radio transmitter in the agents' car, Curiale turned and left, without any additional comment. Later, Curiale picked up his son and two others boys of the same age and drove to a nearby ball park. After removing baseball equipment from his car, Curiale again approached the agents and asked if he would be allowed to finish the game. Agent Curry answered, "Why not?", and then as the appellant walked away, added "What's the trouble? Do you have something on your mind?"

After completion of the ball game, the appellant returned to his home. Two federal agents followed him into his driveway, where Agent Curry for the first time identified himself. He informed Curiale that a matter was under investigation concerning which appellant was believed to have valuable information, and asked the appellant to accompany him and the other agent to the Fifth Precinct of the Suffolk County Police Department about five miles away to discuss the matter at further length. Curiale offered no objection and entered the agents' automobile. Prior to his arrival at the police station at about 8:15 p.m., he had not been advised of his constitutional rights.

At the precinct house, Special Agent Ahearn gave the appellant a printed form setting forth the *Miranda* warnings. The appellant was asked to read the form carefully and sign it if he understood it. After appellant signed the form, Ahearn reminded him that he was not under arrest and was free to leave. Ahearn then expressed interest in

the premises at 160 West Avenue in Patchogue, suggesting that stolen merchandise was stored there. The appellant acknowledged ownership of the premises but denied any knowledge of the stolen goods. He added, however, that only a few days before he had rented a rear room of the building to another individual, but had retained a right of access to the room. Ahearn replied that, based on the information he had, he would like to search the entire premises; to this end, he presented the appellant with a Consent to Search form. Ahearn testified:

> "Mr. Curiale read the form, which I presented to him. After reading it, he looked at me and he made a remark, 'If I don't sign this, you are going to get a search warrant.' At that point, I stopped him and said, 'I don't want you to sign on that basis. If you are going to sign it, do it voluntarily.' He just looked and signed it."

Accompanied by the appellant, the agents proceeded to 160 West Avenue and commenced the search. In the allegedly rented rear room, they found a recently constructed wooden platform which did not produce a hollow sound when tapped. Closer examination revealed over 3,000,000 of the stolen dimes hidden beneath the platform. Unconvinced by the appellant's attempt to disclaim knowledge of, or any involvement in the concealment of the dimes, Ahearn placed Curiale under arrest, and the trial and conviction from which this appeal is taken followed.

Among the several issues raised in this appeal, the principal one is whether the appellant, by signing the Consent to Search form, validly waived the protection of the Fourth Amendment against unreasonable searches and seizures. The resolution of the issue depends on whether his consent

was a voluntary, intentional and understood waiver of a known right or, on the contrary, was the product of deceit, duress and coercion, actual or implicit. *United States* v. *Thompson,* 356 F. 2d 216, 220 (2 Cir. 1965); *United States* v. *Smith,* 308 F. 2d 657, 663 (2 Cir. 1962). It is well settled that when the prosecution seeks to rely upon consent to justify the lawfulness of a search, it has the burden of proving that the consent was, in fact, freely and voluntarily given. *Bumper* v. *North Carolina,* 391 U.S. 543, 548 (1968).

Appellant's argument with respect to the issue of consent is two-pronged. The first part, based on the agents' alleged deceit and on his own alleged misunderstanding, is predicated on the facts (1) that at about 6:45 p.m. on the day of the search, the Chief of the Criminal Division of the United States Attorney's office advised Ahearn that the tip, which the government had received, that the stolen dimes were hidden at 160 West Avenue was not sufficient to justify a search warrant for those premises, and (2) that thereafter Ahearn and his superior decided to interview the appellant at the precinct office in hopes of securing a consent to search. It is urged that, in these circumstances, the agents' failure to inform Curiale that there was not enough information for a search warrant, after the latter had suggested, and allegedly believed, that, "If I don't sign this, you are going to get a search warrant," rendered the "consent" to search involuntary.

In support of this position, the appellant relies principally on the recent pronouncement of the Supreme Court in *Bumper* v. *North Carolina, supra.* In that case the Court held that a search cannot be justified as lawful on the basis of consent when that "consent" has been given only after the official conducting the search has asserted that he possesses a warrant. The Court reasoned:

> "When a law enforcement officer claims authority to search a home under a warrant, he announces in effect that the occupant has no right to resist the search. The situation is instinct with coercion—albeit colorably lawful coercion. Where there is coercion there cannot be consent."

Id. at 550. There was no such coercion here. Curiale's statement concerning the search warrant demonstrated an awareness of his right to resist the agents' search in the absence of a warrant. Although he understood his right, he nevertheless chose to relinquish it. We need not decide whether the voluntariness of that relinquishment would have been compromised by the agents' complete failure to respond to the appellant's statement. Here Ahearn's response was sufficient to put the appellant on notice that his consent should not be conditioned on the availability or unavailability of a warrant. There was no duty to disclose that at that particular moment in a continuing investigation there was insufficient evidence to get a search warrant. In any case, it is clear that Curiale knew what he was doing. Relying upon the fact that the dimes were so well concealed that they would not be found, the appellant hoped to turn suspicion away from himself by appearing to give the authorities innocent and wholehearted cooperation. His lack of success, by itself, does not affect the voluntariness of his assent.

The appellant also urges that his permission for the search was coerced by the circumstances of the close surveillance and questioning of him at the precinct office. In support of this position at the before-trial suppression hearing, he introduced a psychiatrist who testified that any person under such circumstances "would be under duress and would be responsive to a feeling of doubt and

difficulty and uncertainty as to what was going to happen." Furthermore, on the basis of a twenty minute interview with the appellant, the same psychiatrist suggested, with respect to appellant's claim that at the precinct house his heart was beating very fast, that this "represents a very definite sign of anxiety and severe anxiety, . . . that this patient was under considerable strain and . . . that there would be a doubt in my mind as to whether [the appellant] knew really what he was signing." In spite of this testimony, the lower court made a clear finding that appellant undertook a voluntary, calculated risk in consenting to the search. We are not persuaded that that finding is clearly erroneous; indeed, it is reasonable and logical in the light of the evidence.

Nor do we feel compelled, by the cases cited in appellant's brief, to rule otherwise. Nothing in *Martinez* v. *United States,* 380 U.S. 260 (1965), *vacating* 333 F. 2d 405 (9 Cir. 1964) so requires. In that case the Supreme Court, without opinion, remanded to the district court to make findings with respect to the petitioner's consent to search, because it concluded that a more exhaustive factual determination was called for. *Catalanotte* v. *United States,* 208 F. 2d 264 (6 Cir. 1953), is also distinguishable. There the court found that the defendant's yielding to a request for leave to search with the words, "the house is yours" was involuntary, because any person, "when a group of police officers had barged into his home in the dead of night indicating strongly that he was under investigation for crime, would be frightened into inviting the officers to go ahead and search his premises." *Id.* at 268. There was no such intimidation here. *United States* v. *Alberti,* 120 F. Supp. 171 (S.D.N.Y. 1954), is also inapposite. In *Alberti,* the court reasonably concluded that the defendant, who had two children asleep in another bedroom of his

apartment, was under arrest by five agents, some of them obviously armed, who had informed him that they intended to search his quarters. Under these circumstances the accused did not act voluntarily, but out of resignation, in advising the agents to "go right ahead" and search. In the present case the appellant was not subjected to any such coercive pressures or with such an ultimatum.

Appellant's second argument is that the failure to give the *Miranda* warnings at the time he was taken to the precinct station vitiated the ensuing proceedings which culminated in the consent to search. We cannot agree. *Miranda* v. *Arizona,* 384 U.S. 436, 477 (1966), requires that certain warnings be given when the person being interrogated is "in custody at the station or otherwise deprived of his freedom of action in any significant way." Here, the facts clearly show that appellant's freedom of movement was not restricted prior to the warnings, and he was so advised. The situation is unlike that in *Orozco* v. *Texas,* 394 U.S. 324 (1969), on which the appellant also relies, where it was determined that the interrogated suspect was under arrest and not free to go as soon as he gave his name. Moreover, the appellant's claim lacks merit because no incriminating statements were elicited from him during the period prior to the warnings.

Appellant next argues that the record is barren of evidence to justify the trial court's charge on aiding and abetting. There is no basis for this contention, as there was evidence from which the jury could have found that the appellant associated himself with the venture and sought by his action to make it succeed. *United States* v. *Peoni,* 100 F. 2d 401, 402 (2 Cir. 1938); *Nye & Nissen* v. *United States,* 336 U.S. 613, 619 (1949). Indeed, the charge was necessary because the jury could have found that the appellant did not take part in the actual hijacking but

only aided in bringing it about or in concealing the stolen coins.

Finally, there is no merit to appellant's challenge to the court's instruction that the accused's knowledge that the goods in question had been stolen, may be inferred from his possession of recently stolen goods. *United States* v. *Hart*, 407 F. 2d 1087, 1091 (2 Cir. 1969). Nor may the court's charge be construed as a comment on appellant's failure to take the stand, where, as here, any explanation showing his possession to have been lawful could have been made through other evidence.

The judgments of conviction are affirmed.

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366-308—69

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 589

RAYMOND CHARLES CURIALE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a–9a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on August 4, 1969. Mr. Justice Harlan extended the time for filing a petition for a writ of certiorari to September 19, 1969, and, on September 15, 1969, the petition was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in the circumstances of this case, petitioner's written consent to the search of his business premises, given after due warning of his rights, was voluntary.

2. Whether, after petitioner had testified as to his ignorance of the presence on his premises of certain stolen property, it was a violation of petitioner's right against self-incrimination to instruct the jury that knowledge by petitioner of the stolen nature of the property could be inferred if the jury believed that his possession of such property was "not satisfactorily explained."

STATEMENT

After a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted on three counts of an indictment [1] which charged that he received and concealed government property, $300,000 in United States dimes, which had been stolen from an interstate shipment, in violation of 18 U.S.C. 641, 659 and 2315. On October 25, 1968, he was sentenced to concurrent terms of five years' imprisonment on each count, subject to the parole eligibility provisions of 18 U.S.C. 4208(a)(2) (7 R. 10–11).[2]

1. The undisputed evidence showed that on May 29, 1968, a Railway Express Agency truck, loaded with

[1] These were Counts 1, 2 and 4. Count 3 was dismissed by the court during the trial; other Counts were severed before trial.

[2] "R." preceded by the volume number refers to the seven volume record on file with the Clerk of this Court. The first six volumes are consecutively paginated and contain a transcript of the pretrial motion to suppress (1 R. 1–102, 2 R. 103–168), and the trial transcript. Volume 7 R. deals with post-trial matters.

$500,000 in newly minted dimes, was hijacked at Fort Lee, New Jersey, by three unidentified men (2 R. 204–211). The next day the truck was found near Patchogue, New York, approximately seventy-five miles from Fort Lee, abandoned and empty of its cargo (3 R. 251, 257).

Petitioner operated a garment manufacturing plant in Patchogue. His factory was housed in a former garage (4 R. 394) that had overhead doors sufficiently large to accommodate the stolen tractor-trailer (4 R. 395; 3 R. 249–258). On May 30–31, 1968, two police officers in Patchogue noticed, both outside and inside petitioner's business premises, tire markings of distinctive design. One of the officers, who had viewed the recovered hijacked truck, believed the tire markings were similar to the markings that would be made by the tires of the hijacked truck (4 R. 394–397, 402–404). On June 6, as a result of petitioner's execution of a consent to search form,[3] agents of the F.B.I. searched petitioner's factory. In the rear room, the agents found a raised platform, approximately two feet high. Concealed within the platform were $304,000 of the stolen dimes (3 R. 284–286, 291), packed in 304 canvas bags, each marked "$1,000 dimes, U.S. Mint 1967" (1 R. 83).

2. Before trial, petitioner moved to suppress the dimes seized at his business premises. At the hearing, the evidence showed that on June 6, 1968, the F.B.I. received a tip that the stolen dimes were stored in petitioner's factory, and thereupon commenced a sur-

[3] The events leading up to petitioner's signing of the form are discussed *infra* pp. 3–6.

veillance of petitioner (1 R. 121). Petitioner noticed he was being followed and indicated to the agents that he knew he was under surveillance (1 R. 20; see 3 R. 270–271). The F.B.I. agents ascertained from an assistant United States Attorney that the government's information was insufficient to warrant a request for a search warrant (1 R. 98, 106–107). The agents were instructed to ask petitioner if he was amenable to an interview, in the hope that such interview would result in petitioner granting them the right to search (1 R. 13, 22–25, 107); if petitioner refused, the agents were to terminate the surveillance (1 R. 13, 22, 24). At the driveway of petitioner's home, the agents approached him and asked that he accompany them to a local police station. They told him that they believed he had information which would be of assistance in an investigation that the F.B.I. was conducting (1 R. 9, 27, 30). Petitioner agreed to go with them and entered the agents' vehicle. He was not handcuffed and was seated alone in the rear of the vehicle.[4] Petitioner's wife was present at the time and she was told by an agent that petitioner had been asked and had agreed to go to the police station in order to aid in an investigation (1 R. 9). Mrs. Curiale replied that she was not concerned since petitioner had never been in any trouble (1 R. 33–35). The agents believed that they had no authority to arrest petitioner (1 R. 49–50),

[4] The agents testified that handcuffs and close custody are employed only in arrest cases (1 R. 9, 61–62).

and said nothing to petitioner about an arrest (1 R. 9–10.[5]

Upon arrival at the Patchogue police station, petitioner was interviewed by Agent Ahern, who explained to petitioner his right to silence and counsel. Petitioner stated he understood his rights against self-incrimination, and then read and signed a form which contained these warnings (1 R. 66–69). At that time petitioner was twice told that he was not under arrest, and that he was free to leave; in response, he nodded affirmatively (1 R. 70–71, 99). Agent Ahern then told petitioner that the F.B.I. was interested in his Patchogue business premises; that they had information that "stolen merchandise was stored there." Petitioner replied that his company controlled the premises but that he had recently rented the rear room to an individual whose name he did not then recall (1 R. 71–72, 92). Petitioner added that he had retained the right to enter this rear room and store his own merchandise there (1 R. 72). Upon being told that the F.B.I. wanted to make a search, petitioner was handed a consent to search form. After reading the form, peti-

[5] The record does not support petitioner's claim that he was told at his home that he was under arrest and that there can be "no dispute" as to this (Pet. 5, 6–7, 11). Petitioner's certainty is based on an incomplete answer of a testifying agent (see Pet. 5), which defense counsel interrupted with an objection, and which objection was sustained by the court. The record shows that immediately after counsel's objection, the prosecutor reworded his question and the agent replied that he did not tell petitioner he was under arrest (1 R. 9–10).

tioner stated that if he did not sign the form the agent would get a search warrant. The agent answered that he did not want petitioner to sign on that basis. He told him, "If you are going to sign it, do it voluntarily." Petitioner then "just looked and signed it" (1. R. 73). Before signing it, petitioner had read the form and indicated to Agent Ahern that he understood it (1 R. 74).[6]

Petitioner also agreed to accompany the agents who conducted the search. After petitioner unlocked the premises, the agents found the 304 bags of stolen dimes within a newly constructed platform, ostensibly designed to keep stored textile piece goods off the floor (1 R. 75–77, 82). After the bags were found, and following some later conversation between petitioner and Agent Ahern, petitioner was arrested and handcuffed (1 R. 83–84).

Aside from the testimony of Mrs. Curiale, the only defense evidence on the motion to suppress was the testimony of a defense psychiatrist (2 R. 138–143). The psychiatrist, who had interviewed petitioner for twenty minutes, testified that any person subject to

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[6] Petitioner contends that two inquiries were made by him concerning a search warrant and that Agent Ahern misled him by his silence on the second occasion (Pet. 8–9). The record indicates, however, that petitioner made no inquiries, but only the one statement as to the agent obtaining a search warrant. Agent Ahern, after identifying the exhibit signed, repeated and amplified his prior testimony as to petitioner's statement and immediate signing thereafter (1 R. 73–74). The cross-examination indicated the statement by petitioner was only made once (2 R. 114). The declarative nature of the statement is made clear by Agent Ahern's testimony, that petitioner had said: "If I don't sign it, you will get a search warrant anyway" (4 R. 439).

such close surveillance and subsequent questioning at police headquarters would feel duress; that he believed petitioner was under considerable strain at that time; and that there was doubt in his mind that petitioner "knew really what he was signing" when he signed the consent to search form (Pet. App. 7a).

Based on this evidence, the district court ruled that petitioner signed the waiver of the right against self-incrimination and the consent to search knowingly and understandingly. The court stated:

> I believe that this defendant knew exactly what he was doing. He took a gamble and he hoped that the search would reveal nothing. The coins were well hidden.
>
> He gambled and he lost; that is all that amounts to [2 R. 168].

3. In testifying at trial petitioner stated that on May 27, 1968, an unknown man came to his business establishment and identified himself as a Mr. Salb, a dress manufacturer from Pennsylvania. He stated that Salb wanted to store some piece goods at a location closer to New York than his Pennsylvania location and therefore rented the back room of petitioner's factory. Petitioner gave him a receipt for the rental and security deposit, and a set of keys. Subsequently, Salb called and stated he wanted to build a platform for his piece goods and he sent someone named "Joe" to do so. (4 R. 485–486, 493).[7] Salb permitted peti-

[7] The government evidence showed that it was petitioner who planned to erect the platform. In late May, petitioner told a garment manufacturer, for whom he did contract sewing of garments, that he was going to construct a platform in the rear room where petitioner stored the manufacturer's piece goods (4 R. 410–413).

tioner to use the rear area for his own storage purposes, until Salb's piece goods arrived (4 R. 494). Petitioner also testified that he had signed the consent to search form "because I figured I had nothing to hide in there" (4 R. 489).

In instructing the jury, the court, after defining the various types of possession (6 R. 572–574) stated:

> What is the significance of possession? If you find, beyond a reasonable doubt, that the defendant had possession of the coins and if you find that the coins were recently stolen, then if such possession is not satisfactorily explained, it is a circumstance from which the jury may reasonably draw the inference and find in the light of surrounding circumstances shown by the evidence in the case, that the person in possession knew the property had been stolen [6 R. 574].

While petitioner had originally objected to the instruction on another ground (6 R. 550), he made no objection at trial that the reference to an unsatisfactory explanation was violative of petitioner's right against self-incrimination (see 6 R. 597; see also 7 R. 2, 4).

ARGUMENT

1. The essence of petitioner's argument (Pet. 4–13) is that his signing of the consent to search form was involuntary in the context of the events which preceded it—*i.e.* the surveillance, his alleged illegal custody and transportation to police headquarters and the questioning in the coercive atmosphere of the police station. This, however, was a factual question which was decided against him by both courts below

(Pet. App. 7a, 2 R. 168).[5] There is no reason for this Court to grant plenary review of this factual determination. See *United States* v. *Mitchell*, 322 U.S. 65, 70; *Drummond* v. *United States*, 350 F. 2d 983, 988 (C.A. 8), certiorari denied *sub nom. Castaldi* v. *United States*, 384 U.S. 944; *Evans* v. *United States*, 382 F. 2d 739, 741 (C.A. 9); *Gorman* v. *United States*, 380 F. 2d 158, 163 (C.A. 1); *United States* v. *Vickers*, 387 F. 2d 703 (C.A. 4), certiorari denied, 392 U.S. 912.

The evidence shows that, before any reference at police headquarters to the consent to search form, the agent gave petitioner full warnings as to his right to silence and to counsel and twice advised petitioner that he was free to leave. Petitioner did not avail himself of that opportunity. Moreover, when the agent thereafter presented him with the consent to search form, it was made perfectly clear that he only wanted petitioner to sign it if it was his voluntary choice to do so. Thus even if it be assumed *arguendo* that petitioner was in custody when he was driven to police headquarters—although it is our position, as it was that of the courts below that he voluntarily cooperated with the F.B.I. in accompanying them to headquarters, see *Hicks* v. *United States*, 382 F. 2d 158, 161 (C.A.D.C.)—any coercive atmosphere was dissipated by the events which followed. These events made clear to petitioner that he could leave any time he chose and

[5] Indeed, defense counsel at trial took the alternative position that the search was voluntary in order to support the claim that petitioner did not know the dimes were in his warehouse. See 4 R. 434–438, 489; 5 R. 513.

that he was fully advised of his constitutional rights. Cf. *Wong Sun* v. *United States*, 371 U.S. 471, 491.[9]

2. Petitioner attacks the court's instructions that in the absence of a satisfactory explanation, the jury could infer knowledge of the stolen character of the property possessed from the fact that the goods were recently stolen and that they were in defendant's possession (See Pet. 13–14). Petitioner contends that such an instruction was an infringement of his right to silence in contravention of *Miranda* v. *Arizona*, 384 U.S. 436, 468, n. 37 (Pet. 14–15). That decision, however, has nothing to do with this aspect of petitioner's case. The footnote in *Miranda* relied upon reads:

> * * * it is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation. The prosecution may not * * * use at trial the fact that he stood mute or claimed his privilege in the face of accusation. * * *

---

[9] *Bumper* v. *North Carolina*, 391 U.S. 543, upon which petitioner in part relies (Pet. 9, 11), is inapposite, because Agent Ahern, unlike the police officer in *Bumper*, never claimed he had a search warrant. On the contrary, he told petitioner that if he signed the consent form it had to be on a voluntary basis. *Orozco* v. *Texas*, 394 U.S. 324, is also not applicable (see Pet. 12), because in that case there was a failure to give a warning as to testimonial rights before questioning commenced. In the present case, Agent Ahern gave such a warning at the outset of the interview; moreover, petitioner made no incriminating statements prior to such warnings.

Neither the instruction referred to above nor any other aspect of the trial in any way ran foul of this dictum of the *Miranda* case. The fact that petitioner had claimed his privilege when interviewed by the F.B.I. was ruled inadmissible by the trial court, in a hearing outside of the presence of the jury (see 4 R. 343–348; 2 R. 170). Moreover, petitioner testified in his own defense at trial, so that there is no basis for any claim that the instruction was a disguised comment on the defendant's failure to testify. In fact, the instruction complained of merely gave permission to the jury to draw a reasonable inference from all the evidence, and in doing so to consider petitioner's explanation of the possession of the dimes. This instruction was in accord with the settled precedents. See *Wilson* v. *United States*, 162 U.S. 613, 619; *Rugendorf* v. *United States*, 376 U.S. 528, 536–537. See also, *Herman* v. *United States*, 289 F. 2d 362, 367 (C.A. 5), certiorari denied, 368 U.S. 897; *Blunt* v. *United States*, 404 F. 2d 1283 (C.A. D.C.).[10]

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[10] While petitioner contends that *Young* v. *State of Florida*, 203 So. 2d 650, is strongly supportive, with only a minor "truly significant" distinction, that case, in fact, is totally inapposite. In *Young*, the jury had had presented to it evidence that the defendant, upon his apprehension, had declined to give a statement. Moreover, after referring to the inference which might arise from unexplained possession, the trial court in *Young* went on to define this explanation of possession as that given by a defendant when he is first under a duty to speak, after the recently stolen property is discovered in his possession (203 So. 2d at 651). Petitioner's jury was never told he was under any such duty to speak or explain.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari be denied.

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OCTOBER 1969.